Affin Bank Bhd v Tan Sri Kishu Tirathrai

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03–172 OF 2006
JAMES FOONG, ABDULL HAMID EMBONG AND VINCENT NG JJCA
17 DECEMBER 2007

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Bankruptcy — Creditors petition — Presentation of — Hearing — Parties legally represented — Receiving and adjudication orders made — Set aside on appeal to judge in chambers — No allegation of collateral purpose — Whether judgment creditor had to appear in person on hearing date — Whether judgment creditor must prove debt on hearing date — No dispute of amount owing earlier — Whether estopped from raising issue on appeal — Bankruptcy Act 1967 s 6(2)

C

D

Statutory Interpretation — Word 'shall' — Whether conferred a mandatory requirement — Bankruptcy Act 1967 s 6(2)

E

The appellant/judgment creditor commenced bankruptcy proceedings against the respondent/judgment debtor after obtaining a summary judgment against the respondent on 19 February 2002. The bankruptcy notice and creditor's petition was subsequently issued and served on the respondent. The respondent sought to set aside the creditor's petition by filing a notice of intention to oppose the creditor's petition which was dismissed by the senior assistant registrar on 5 November 2004. The respondent's appeal to the judge in chambers was dismissed. The respondent's appeal to the Court of Appeal against the decision was still pending. On 11 May 2005, the senior assistant registrar made a receiving order and adjudication order against the respondent. The respondent's appeal against the receiving order and adjudication order made was allowed with costs by the learned judge on 16 October 2006. Hence this appeal. The respondent argued that the appellant had not complied with s 6(2) of the Bankruptcy Act 1967 ('the Act') which required that the appellant prove his debt at the hearing of the creditor's petition. Further, it was contended that the affidavit verifying the said petition was insufficient and could not be relied to prove the debt. The appellant, on the other hand, contended that the summary judgment was prima facie evidence of the debt owed by the respondent.

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Held, allowing the appeal with costs:

(1) The respondent in the instant case had not provided any material or

iota of evidence before the High Court that the value of the debt had fallen below the statutory threshold sum of RM30,000 nor did he set out some other cogent reason to challenge the petition. As the affidavit verifying the petition was not challenged, the 'personal attendance' of the petitioning creditor was not required and the attendance of the bank's counsel was sufficient (see para 15).

(2) Therefore, although the word 'shall' appeared in s 6(2) of the Act, it was not mandatory for the petitioning creditor to prove the debt again through cross-examination at the hearing of the petition, especially when the affidavit verifying the petition was never challenged nor was there any material before the court to challenge the affidavit. Further, the respondent was estopped from contending that the amount claimed was erroneous as he had failed to give any notice to dispute the amount within the prescribed time as required under s 3(2)(ii) of the Act (see paras 17 & 20).

[Bahasa Malaysia summary

Perayu/pemiutang penghakiman telah memulakan prosiding kebankrapan terhadap responden/penghutang penghakiman setelah memperoleh penghakiman terus terhadap responden pada 19 Februari 2002. Notis kebankrapan dan petisyen pemiutang kemudiannya dikeluarkan dan diserahkan ke atas responden. Responden memohon untuk mengenepikan petisyen pemiutang itu dengan memfailkan notis niat untuk membantah petisyen pemiutang yang telah ditolak oleh penolong kanan pendaftar pada 5 November 2004. Rayuan responden kepada hakim dalam kamar telah ditolak. Rayuan responden ke Mahkamah Rayuan terhadap keputusan tersebut masih belum selesai. Pada 11 Mei 2005, penolong kanan pendaftar telah membuat perintah penerimaan dan perintah penghukuman terhadap responden. Rayuan responden terhadap perintah penerimaan dan perintah penghukuman yang dibuat telah dibenarkan dengan kos oleh hakim yang bijaksana pada 16 Oktober 2006. Justeru itu rayuan ini. Responden berhujah bahawa perayu tidak mematuhi s 6(2) Akta Kebankrapan 1967 ('Akta tersebut') yang memerlukan perayu membuktikan hutangnya semasa perbicaraan petisyen pemiutang. Selanjutnya, ia dihujahkan bahawa afidavit yang mengesahkan petisyen tersebut tidak memadai dan tidak boleh digunakan untuk membuktikan hutang tersebut. Perayu, sebaliknya menegaskan bahawa penghakiman terus bertarikh 19 Februari 2002 adalah keterangan prima facie hutang yang terhutang oleh responden.

Diputuskan, membenarkan rayuan dengan kos:

(1) Responden dalam kes ini tidak mengemukakan apa-apa bahan atau

sebarang keterangan di hadapan Mahkamah Tinggi bahawa nilai hutang telah jatuh di bawah nilai ambang jumlah statutori RM30,000 beliau juga tidak menyatakan beberapa alasan lain yang meyakinkan untuk mencabar petisyen tersebut. Memandangkan afidavit yang mengesahkan petisyen itu tidak dicabar, 'personal attendance' pemiutang yang mempetisyen tidak diperlukan dan kehadiran peguam bank adalah memadai (lihat perenggan 15).

(2) Oleh itu, meskipun perkataan 'shall' tertera dalam s 6(2) Akta tersebut, ia bukan keperluan mandatori untuk pemiutang yang mempetisyen membuktikan hutang itu sekali lagi melalui pemeriksaan balas semasa perbicaraan petisyen tersebut, terutamanya apabila afidavit mengesahkan petisyen itu tidak pernah dicabar juga tidak terdapat apa-apa bahan di hadapan mahkamah untuk mencabar afidavit tersebut. Selanjutnya, responden telah diestop daripada berhujah bahawa jumlah yang dituntut adalah salah kerana beliau gagal untuk memberikan apa-apa notis untuk mempertikaikan jumlah tersebut dalam masa yang ditetapkan seperti yang diperlukan di bawah s 3(2)(ii) Akta tersebut (lihat perenggan 17 & 20).]

Notes

For cases on presentation of creditor's petition, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2389–2390.

Cases referred to

Purrett, Re; ex parte Purrett 1895, The Law Times Vol LXXIII (distd)
Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304 (folld)
Tan Sri Kishu Tirathrai, Re; ex parte Affin Bank Bhd [2007] 2 MLJ 53 (refd)
Teok Kien Seng, Re; ex parte Saw Siew Chew [1991] 3 CLJ 2599 (refd)

Legislation referred to

Bankruptcy Act 1967 s 6(2)

Appeal from: Bankruptcy No D3–29–53 of 2003 (High Court, Kuala Lumpur)

Yoong Sin Min (How Wei Theng with him) (Shook Lin & Bok) for the appellant.
T Gunaseelan (Norman Fernandez with him) (Gunaseelan & Associates) for the respondent.

Vincent Ng JCA (delivering judgment of the court):

[1] The facts of this appeal are as follows. The appellant ('judgment

creditor') granted to the respondent ('judgment debtor') an overdraft facility to the tune of RM2,500,000. The respondent defaulted in making the payments under the facility.

[2] The appellant then commenced an action against the respondent vide Kuala Lumpur High Court Suit No D4-22–524 of 2001 and had on 19 February 2002 obtained summary judgment before the senior assistant registrar in the sum of RM2,538,959.50 (as at 31 December 2000). The respondent's appeal to the judge in chambers against the decision was dismissed on 27 February 2003.

[3] The appellant subsequently commenced bankruptcy proceedings against the respondent and issued a bankruptcy notice on 7 January 2003. The bankruptcy notice was served on the respondent on 30 April 2003.

[4] On 31 July 2003, the creditor's petition was filed against the respondent. Service of the creditor's petition on the respondent was by way of substituted service which was effected as follows:

(i) a copy of the creditor's petition was posted at the last known address of the respondent;

(ii) a copy of the creditor's petition was posted at the notice board of the court;

(iii) the creditor's petition was advertised in the *New Straits Times*.

[5] By a notice of intention to oppose the creditor's petition dated 10 June 2004 (encl 17) and summons in chambers dated 11 June 2004 (encl 19), the respondent sought to set aside the creditor's petition.

[6] On 5 November 2004, the senior assistant registrar dismissed the notice to oppose and the summons in chambers. The respondent's appeal to the judge in chambers was also dismissed on 9 May 2005. The respondent then filed an appeal to the Court of Appeal on 10 May 2005 against this decision. This appeal is still pending.

[7] On 11 May 2005, the senior assistant registrar made a receiving order and adjudication order against the respondent. The respondent's appeal was allowed with costs by the learned judge on 16 October 2006. Thus, the appeal before us.

[8] The issue before us is whether appellant had complied with the provision of s 6(2) of the Bankruptcy Act 1967 ('the Act'). Section 6(2) of the Act states as follows:

> (2) At the hearing the court shall require proof of —
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> (a) the debt of the petitioning creditor; and
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> (b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, some or one of the alleged acts of bankruptcy; and
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> (c) if the debtor does not appear, the service of the petition, and if, satisfied with the proof may make a receiving order in pursuance of the petition.

[9] The respondent contends that s 6(2) of the Act is very clear that the petitioning creditor must prove his debt at the hearing of the creditor's petition and that the affidavit verifying the petition which exhibited the judgment dated 19 February 2002 is insufficient and cannot be relied on to prove the debt.

[10] The appellant on the other hand contends that the summary judgment dated 19 February 2002 is prima facie evidence of the debt owed by the respondent. Indeed, on appeal, this judgment was affirmed by the judge, and there was no stay on that decision. The law is settled that the trial judge should not go behind the judgment to ascertain the validity of the order. The appellant referred us to the case of *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 ('*Sovereign General Insurance*'), in which the Supreme Court had held that (at p 305):

> In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. ... [Nor] is it open to the learned judge ... to strike out the creditor's petition by disputing the validity of the orders made in earlier execution proceedings when the orders have not been set aside.

[11] The learned judge in the court below in *Re Tan Sri Kishu Tirathrai; ex parte Affin Bank Bhd* [2007] 2 MLJ 53, accepted the respondent's contention and, in reference to s 6(2) of the Act, he said (at p 58):

> The provision is clear. At the hearing, the court shall require proof of the debt of the judgment creditor. In other words what counsel here is submitting is that beyond that as submitted by counsel for judgment creditor, it is mandatory for the court to nevertheless require proof of the debt of the petitioning creditor. That being manifestly absent, it has occasioned an injustice that resulted in the impugned orders of the senior assistant registrar.

A And, His Lordship further added (at p 61):

> The fact that the judgment debtor may not have raised the issue at the hearing is of no consequence. The bankruptcy court is under a responsibility and is obliged to be satisfied by evidence, of the debt and this is so even if the judgment debtor does not appear at the hearing.

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[12] After having read the cause papers and heard the submissions of both counsel we are of the view that, in arriving at the above conclusion the learned High Court judge fell into error, when be applied the ratio in C *Re Purrett; ex parte Purrett* 1895, The Law Times Vol LXXIII at p 224 (*'Re Purrett'*) without proper analysis of the peculiar factual matrix which govern the decision. *Re Purrett* was a very old English case which, upon our careful reading, discloses the following features:

D (i) according to Williams J, a debtor may appear to show cause against the petition and the act of bankruptcy on matters that the debtor shall have given notice that he intends to dispute, in which event the petition has to be proved. Williams J also opined that the judgment creditor may if he requires, be given such further time as the court may think fit to E enable him to prove the debt.

(ii) most importantly, well before the hearing of the creditors petition the debtor in *Re Purrett* did in fact give notice specifying the precise nature of his complaint.

F (iii) the judgment debtor's primary complaint then before the bankruptcy court was that the bankruptcy proceedings were being used by the judgment creditor for the purpose of getting rid of the judgment debtor from the farm and not for purpose of collecting the debtor's assets, that is, the proceedings were used for a collateral purpose.

G (iv) at the hearing of the creditors petition — even though the petitioning creditor was present at the bankruptcy proceedings — the registrar declined (wrongfully, according to Williams J) to order the petitioning creditor to go into the witness box to be cross examined. The registrar's reason for so declining was that since an office copy of the judgment H was produced, the petitioning creditor need not be cross examined until some evidence to displace the judgment had been given.

(v) it must also be noted that even in *Re Purrett*, the other judge, Wright J had rightfully observed that the attendance of a judgment creditor is I normally required for the purpose of scrutiny by the court during the bankruptcy proceedings.

[13] Having noted (i) to (v) above, our view is that the judges in *Re Purrett* were driven to allow the appeal against the registrar's decision because the latter should have, in justice, allowed cross examination of the petitioning creditor (who was indeed then present) on the issue of the judgment debtor's charge that the petition was tainted with a sinister collateral purpose of getting rid of the judgment debtor from his farm, even though the petition was based on a debt due upon a final judgment of the court. It is of interest to note that this old English case (more than 110 years old) was seldom if ever referred to by the English courts or our local courts. In any event, it is our view that to require personal attendance of the judgment creditor, where there are no assertions by the judgment debtor specifying precisely the matters which he intends to dispute or to challenge, would be unreasonable and impracticable. It should also be observed that companies could only attend bankruptcy proceedings through their representatives but not 'in person'.

[14] With the greatest respect, the learned judge in the appeal now before us should not only have taken heed of the binding authority in *Sovereign General Insurance* but should also have followed the rational and practical decision of Shankar J in *Re Teok Kien Seng, ex parte Saw Siew Chew* [1991] 3 CLJ 2599, who had this to say:

> Teok was not in court. His counsel submitted however that unless Saw was personally present the court could not make the orders. The presence of her solicitors was not enough. He cited Vol 3 *Halsbury's Laws of England* (4th Ed) para 341. The practice of our courts has always been to allow judgment creditors to be legally represented. English authorities are at best persuasive and their citation on such mundane matters must be deprecated. However it will be observed that *Atkin's Encyclopedia of Court Form* Vol 7 (2nd Ed) at p 98, para 35 specifically allows counsel and solicitors to appear at the hearing of a bankruptcy petition.
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> The Bankruptcy Rules (hereafter referred to as the Rules) rr 120 and 122 should not be read as requiring otherwise. *I agree with the official assignee that these Rules — which require the petitioning creditor to be present — must be taken to refer to a situation where he is acting in person or where there is serious challenge to the existence of the act of bankruptcy.*
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> (Emphasis added.)

[15] The respondent in the instant case had not provided any material or iota of evidence before the High Court that the value of the debt had fallen below the statutory threshold sum of RM30,000 nor did he set out some other cogent reason to challenge the petition such as has happened in *Re Purrett*. It is this court's view that, as the affidavit verifying the petition was not challenged, the 'personal attendance' of the petitioning creditor is not required and the attendance of the bank's counsel is sufficient.

A **[16]** One of the accepted and settled canons of construction is that the expression 'shall' in a statutory provision should not always be construed to be mandatory in nature without any regard to the circumstances in which the provision is meant to be applied.

B **[17]** Thus, notwithstanding the word 'shall' that appears in s 6(2) of the Act, it is the view of this court that it is not a mandatory requirement for the petitioning creditor to prove the debt again through cross-examination at the hearing of the petition, especially when the affidavit verifying the petition was never challenged nor was there any material before the court to challenge the C affidavit. Thus, we hold that the word 'shall' in s 6(2) of the Act should be liberally interpreted in the context of bankruptcy proceedings. The word should be construed as directory rather than mandatory in nature.

D **[18]** It must be emphasised again that since there was no material before the court that requires the petitioning creditor to prove the debt again at the hearing, the court below should have abided by the decision in *Sovereign General Insurance*, which precludes the judge from going behind a judgment which has not been set aside or stayed.

E **[19]** The fact that the appeal on the summary judgment was dismissed by the learned judge on 27 February 2003 goes to show that there is a clear proof of debt.

F **[20]** Also, s 3(2)(ii) of the Act would further weaken the respondent's case, as it provides that, 'a bankruptcy notice … shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due *unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice* on the ground of G such mistake'. Here, the respondent had failed to give any notice to dispute the amount in the bankruptcy notice within the time prescribed. Consequently, the respondent is estopped from contending that the amount claimed is erroneous.

H **[21]** For the above reasons, we allowed the appellant's appeal with costs here and in the court below, and the deposit to be refunded to the appellant. The learned judge's order dated 16 October 2006 was set aside and the senior assistant registrar's order granted on 11 May 2005 was reinstated.

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[22] My learned brothers, James Foong JCA and Abdull Hamid Embong JCA have seen this judgment in draft and has expressed their agreement with it.

Appeal allowed with costs.

Reported by Navit Kaur Randhawa